[redacted]

Supreme Court of the [redacted]

October Term, [redacted]

No. 349

[redacted]

[redacted]

vs.

THE UNITED STATES OF [redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HAMBURG-AMERICAN LINE, Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

STATEMENT UNDER RULE 13, PARAGRAPH 4

Action commenced by filing of petition on April 7, 1930.

There has been no change in the original parties.

Answer filed April 2, 1931.

Notice of motion for judgment on the pleadings served July 23, 1931.

Motion for judgment on the pleadings argued before Judge Coleman on August 4, 1931; judgment directed for plaintiff on the second and third causes of action and for the defendant as to the first cause of action.

Order for Judgment signed on August 13, 1931; entered on September 3, 1931.

Judgment entered September 17, 1931.

Appeal taken by plaintiff on the first cause of action on November 6, 1931.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 47/112

HAMBURG-AMERICAN LINE, Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

PETITION

Plaintiff, a corporation duly organized and existing under and pursuant to the laws of the Republic of Germany, and having a place of business and transacting business at #39 Broadway, New York, N. Y., which is within the limits of the District Court of the United States for the South-

ern District of New York, brings this petition and complaint against the United States, and thereupon plaintiff respectfully represents and alleges as follows;

For a First Cause of Action

1. That during all the times hereinafter mentioned, plaintiff was and still is a corporation duly organized under the laws of the Republic of Germany and engaged as a common carrier in the transportation of passengers for hire between European and other ports and seaports of the United States.

2. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "Deutschland".

[fol. 3] 3. That prior to the commencement of this action, and on or about October 22, 1928, plaintiff brought to the United States on the S. S. "Deutschland" at the port of New York, the alien, Philip O'Reilly, age 49, applying for admission to the United States as a returning resident, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

4. That the said Philip O'Reilly was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that he was a non quota immigrant not in possession of any immigration visa; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for his passage from the initial point of departure to the point of arrival, to wit, $140.00, making a total of $1,140.00 thus sought to be imposed.

5. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

6. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Philip O'Reilly establish the following facts:

(a) That the said Philip O'Reilly was born in and is a native of Ireland.

[fol. 4] (b) That the alien was a returning resident, having been out of the United States since June 18, 1928, and before presenting himself as a passenger upon the plaintiff's S. S. "Deutschland", presented a British passport issued at San Francisco, California, on June 1, 1928, and testified before a Board of Special Inquiry that he was a Catholic priest and was returning to rejoin his pastorate at Virginia City, Nevada, and had forgotten to obtain a return permit.

7. That the immigration law in effect at the time of the alien's arrival, as described in Section 10 (f) of the Immigration Act of 1924, says in effect that permits issued under this section shall have no effect under the immigration laws except to show that the alien to whom it is issued is returning from a temporary visit abroad, and there is nothing in the section which makes such permits the exclusive means of establishing that the alien is so returning. Furthermore, Section 13 (b) of the same Act says that immigrants who have been legally admitted to the United States and who depart temporarily may be admitted to the United States without being required to obtain any immigration visa.

8. That thereafter, notwithstanding that the said Philip O'Reilly was returning to the United States after a temporary visit abroad, and in fact was admitted by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien had been found to be a non-quota alien not in possession of any immigration visa or return permit. [fol. 5] A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

9. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "Deutschland" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

10. That in transporting the said alien to the United States the plaintiff acted on the belief that he came within

the exceptions to the Immigration Act of 1924, being a returning resident.

11. That in transporting the said alien to the United States on the S. S. "Deutschland" the plaintiff did not violate any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant, therefore, is without authority in law to retain said money.

12. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided, and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

For a Second Cause of Action

13. Plaintiff realleges paragraph "1" with the same force and effect as if the same was herein fully set forth, [fol. 6] and further complaining of the defendant alleges as follows:

14. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "Cleveland".

15. That prior to the commencement of this action, and on or about December 4, 1928, plaintiff brought to the United States on the S. S. "Cleveland" at the port of New York, the alien, Stefan Mijowitz, age 9, accompanied by his sister Julia, applying for admission to the United States, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

16. That the said Stefan Mijowitz was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that he was afflicted with a loathsome, contagious disease, to wit, ringworm of the scalp; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for his passage from the initial point of departure to the point of arrival, to wit, $66.00, making a total of $1,066.00 thus sought to be imposed.

17. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the Secretary of Labor and submitted evidence to show why a fine should not be imposed.

[fol. 7] 18. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Stefan Mijowitz establish the following facts:

(a) That the said Stefan Mijowitz was born in and is a native of Roumania.

(b) That before presenting himself as a passenger upon the plaintiff's S. S. "Cleveland" the said alien exhibited a proper Roumanian passport together with a non-quota visa issued under the provisions of Section 4 (a) of the Act of 1924 by the American Vice-Consul at Bucharest, Roumania, it having been shown that the child was the son of a naturalized American citizen.

(c) That upon arrival at New York the said Stefan Mijowitz was examined by surgeons of the Public Health Service and certified to have ringworm of the scalp, a loathsome, contagious disease. The evidence shows that the alien was destined to his stepmother and father, the latter being a citizen of the United States.

19. That notwithstanding the certified condition of the applicant, he was a proper subject for consideration under the provisions of Section 22 of the Immigration Act of Feb. 5, 1917, which provides:

"That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor [fol. 8] children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other respon-

sible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until cured and then be admitted, or if it shall be determined that they can be permitted to land without danger to other persons, they may, if otherwise admissible, thereupon be admitted: Provided, That if the person sending for wife or minor children be naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

20. That thereafter, notwithstanding that under the provisions of Section 22 of the Immigration Act of February [fol. 9] 5, 1917, hospital treatment was accorded the said alien based on the fact that he was the child of an American citizen, and was subsequently cured and unconditionally admitted to the United States by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien was found to be afflicted with ringworm of the scalp. A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

21. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "Cleveland" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

22. That in transporting the said alien to the United States the plaintiff acted on the belief that in any event he came within the exceptions to Section 22 of the Immigration Act of February 5, 1917, being the son of an American citizen.

23. That in transporting the said alien to the United States on the S. S. "Cleveland" the plaintiff did not vio-

late any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant, therefore, is without authority in law to retain said money.

[fol. 10] 24. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

For a Third Cause of Action

25. Plaintiff realleges paragraph "1" with the same force and effect as if the same was herein fully set forth, and further complaining of the defendant alleges as follows:

26. That the plaintiff was at all times hereinafter mentioned the owner of the S. S. "New York".

27. That prior to the commencement of this action, and on or about July 29, 1929, plaintiff brought to the United States on the S. S. "New York" at the port of New York, the alien, Regina Pasternak, age 9, accompanied by her mother, Dwojra Pasternak, applying for admission to the United States, who was excluded from admission to the United States as is hereinafter set forth in greater detail.

28. That the said Regina Pasternak was ordered excluded and deported by the inspection officers of the United States Immigration Service on the ground that she was afflicted with trachoma; that the plaintiff was subsequently advised by the Commissioner of Immigration at Ellis [fol. 11] Island, N. Y., that the ascertained facts indicated that a fine of $1,000.00 should be imposed and a sum equal to that paid on account of the said alien for her passage from the initial point of departure to the point of arrival, to wit, $64.00, plus the sum of $128.00 representing passage money for the accompanying alien, Dwojra Pasternak, making a total of $1,192.00 thus sought to be imposed.

29. That plaintiff in accordance with the statute and regulations made thereunder duly filed a protest with the

Secretary of Labor and submitted evidence to show why a fine should not be imposed.

30. The evidence submitted and the file and records of the Bureau of Immigration, Department of Labor, in the case of Regina Pasternak establish the following facts:

(a) That the said Regina Pasternak was born in and is a native of Austria.

(b) That before presenting herself as a passenger upon the plaintiff's S. S. "New York" the said alien through her mother exhibited a proper Austrian passport together with a nonquota visa issued under the provisions of Section 4 (a) of the Act of 1924 by the American Vice-Consul in Vienna, Austria, it having been shown that the child was the daughter of a naturalized American citizen.

(c) That upon arrival at New York the said Regina Pasternak was examined by surgeons of the Public Health [fol. 12] Service and certified to have trachoma. The evidence shows that the alien was destined to her father who was a citizen of the United States.

31. That notwithstanding the certified condition of the applicant, she was a proper subject for consideration under the provisions of Section 22 of the Immigration Act of February 5, 1917, which provides:

"That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, *they may be accorded treatment in hospital until cured and then be admitted,* or if it shall be determined that they can be permitted to land without danger to other persons, they

may, if otherwise admissible, thereupon be admitted: Provided, That if the person sending for wife or minor [fol. 13] children be naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

32. That thereafter, notwithstanding that under the provisions of Section 22 of the Immigration Act of Feb. 5, 1917, hospital treatment was accorded the said alien based on the fact that she was the child of an American citizen, and was subsequently cured and unconditionally admitted to the United States by the Secretary of Labor, the plaintiff was notified that the Secretary of Labor had directed that a fine be imposed on the ground that the alien was found to be afflicted with trachoma. A refund of passage money was not directed in view of the alien being unconditionally admitted to the United States.

33. That subsequently under protest and solely to avoid delay in or refusal of clearance of the said S. S. "New York" the sum of $1,000.00 was paid to the Collector of Customs at the Port of New York, the duly authorized official on behalf of the United States to receive such amount, and that said money was had and received by the defendant.

[fol. 14] 34. That in transporting the said alien to the United States the plaintiff acted on the belief that in any event she came within the exceptions to Section 22 of the Immigration Act of February 5, 1917, being the daughter of an American citizen.

35. That in transporting the said alien to the United States on the S. S. "New York" the plaintiff did not violate any statute of the United States and did not become liable to any fine and that the act of the Secretary of Labor in imposing a fine was without authority and arbitrary, and the defendant therefore is without authority in law to retain said money.

36. That the imposition and exaction of a fine was unwarranted and unlawful and in direct conflict with the law in such cases made and provided, and the sum of $1,000.00 has never been repaid to the plaintiff, although demand has been made of the defendant, but payment has been refused.

Wherefore plaintiff demands judgment against the defendant in the sum of $3,000.00 together with the costs and disbursements of this action and lawful interest, if any.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

[fol. 15] *Duly sworn to by John Pannes. Jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The defendant above named by George Z. Medalie, United States Attorney for the Southern District of New York, its attorney, for its answer to the petition herein, upon information and belief.

As to the First Cause of Action

1. Denies each and every allegation contained in paragraphs numbered and designated as "7", "11", and "12" of the petition.

2. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph numbered and designated as "10" of the petition.

For a First, Separate and Distinct Defense to the First Cause of Action

3. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the [fol. 17] alien before transporting him to the United States;

the petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for transportation to the United States since his inadmissibility was apparent.

As to the Second Cause of Action

4. Denies each and every allegation contained in paragraph numbered and designated "19" of the petition, except the quotation of Section 22 of the Immigration Act of February 5, 1917, therein.

5. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation contained in the paragraph numbered and designated as "22" of the petition.

6. Denies each and every allegation contained in paragraphs numbered and designated "23" and "24" of the petition.

For a First, Separate and Distinct Defense to the Second Cause of Action

7. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the alien before transporting him to the United States; the [fol. 18] petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for transportation to the United States since his inadmissibility was apparent.

As to the Third Cause of Action

8. Denies each and every allegation contained in paragraph numbered and designated "31" of the petition, except the quotation of Section 22 of the Immigration Act of February 5, 1917, therein.

9. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegation contined in the paragraph numbered and designated as "34" of the petition.

10. Denies each and every allegation contained in paragraphs numbered and designated as "35" and "36" of the petition.

For a First, Separate and Distinct Defense to the Third Cause of Action

11. Alleges that the plaintiff was under a legal duty to take reasonable steps to ascertain the admissibility of the alien before transporting her to the United States; the petition does not allege that any precautions were taken; and the records of the Department of Labor, Bureau of Immigration, show that the plaintiff was negligent in accepting the alien at the foreign port of embarkation for [fol. 19] transportation to the United States since her inadmissibility was apparent.

Wherefore the defendant demands judgment dismissing the petition, together with the costs and disbursements of this action.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for the Defendant. Office & P. O. address: U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

Duly sworn to by Frank W. Ford. Jurat omitted in printing.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

SIR: Please take notice that upon the pleadings and proceedings heretofore had in this action, the undersigned will [fol. 21] make a motion before the District Court of the United States for the Southern District of New York, at the motion part of said Court, Room 235, Old Post Office Building, Borough of Manhattan, City of New York, on the 28th day of July, 1931, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment on the pleadings, and that judgment be entered

as prayed for in the complaint, and for such other and further relief as to the court may seem just and proper.

Dated New York, N. Y., July 23, 1931.

Yours, etc., John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

To George Z. Medalie, Esq., United States Attorney, Attorney for Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMO., COLEMAN, D. J., ENDORSED ON NOTICE OF MOTION

Motion granted to extent of directing judgment for plaintiff on the second and third causes of action re decisions of Judge Patterson and Judge Bondy in Lloyd, etc. v. Elting, 45 Fed. (2) 405 and Cosulich, etc. v. Elting (unreported) are conceded by both sides to be controlling on this motion.

August 4, 1931.

Frank J. Coleman, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR JUDGMENT—Aug. 13, 1931

Plaintiff having moved this court for judgment on the pleadings, and said motion having duly come on to be heard by this court on the 4th day of August, 1931, and after hearing John M. Lyons, attorney for the plaintiff in support of said motion, and Frank Chambers, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, Now, on motion of John M. Lyons, attorney for the plaintiff, it is

Ordered that the motion be and the same hereby is granted as to the second and third causes of action and that the plaintiff have judgment thereon in the sum of $2,000 plus costs as taxed, and it is further

[fol. 24] Ordered that the motion be and the same hereby is denied as to the first cause of action and that the defendant have judgment dismissing the said cause of action, and it is further

Ordered that the clerk of this court be directed to enter judgment in accordance with this order.

Frank J. Coleman, U. S. D. J.

(Filed 9/3/31.)

In United States District Court, Southern District of New York

L. 47/112

Hamburg-American Line, Plaintiff,

against

The United States of America, Defendant

Judgment

The plaintiff having moved for judgment on the pleadings and an order having been thereafter entered on the 3rd day of September, 1931, granting the motion in favor of the plaintiff as to the second and third causes of action and directing the entry of judgment in the sum of $2,000.00 plus costs as taxed, and dismissing the complaint as to the first cause of action, Now, on motion of John M. Lyons, Esq., attorney for the plaintiff, it is hereby

[fol. 25] Ordered and Adjudged that the plaintiff herein have judgment in the sum of $2,000.00 plus costs in the sum of $5.00, making a total of $2,005.00, and that the defendant have judgment dismissing the first cause of action.

Dated New York, N. Y., September 17, 1931.

Charles Weiser, Clerk.

In United States District Court

[Title omitted]

Assignment of Errors

Now comes the plaintiff by John M. Lyons, its attorney herein, and says that the District Court of the United

States for the Southern District of New York in rendering the judgment herein, dated September 17, 1931, in favor of the defendant and against the plaintiff, erred in the following respects, to wit:

First. That the court erred in dismissing the first cause of action in the complaint herein and in directing judgment for the defendant.

[fol. 26] Second. That the court erred in holding that the plaintiff was subject to a fine of $1,000.00 for bringing to the United States a non-quota alien who was subsequently admitted by the Secretary of Labor.

Third. That the court erred in holding that a penalty in the amount of $1,000.00 was incurred by plaintiff on account of an alien granted unconditional admission by the Secretary of Labor.

Fourth. That the court erred in holding that the $41,000.00 penalty and the amount of the passage money, which was refunded, was not an invisible penalty.

Fifth. That the court erred in holding that the Secretary of Labor acted within his lawful authority in imposing such a penalty.

Sixth. That the court erred in refusing to hold that the Secretary of Labor acted arbitrarily or unlawfully in imposing such fine which plaintiff seeks to recover.

Wherefore the plaintiff prays that the judgment herein in favor of the defendant may be reversed and held for naught and that the said plaintiff may be restored to all things which it has lost by reason of the said judgment.

Dated New York, N. Y., November 6, 1931.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

Filed, 12/1/31.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Now comes the plaintiff, Hamburg-American Line, and says that on the 17th day of September, 1931, the Court

entered judgment herein dismissing the complaint as to the first cause of action and that by the said judgment certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear in the assignment of errors filed with this petition.

Wherefore the plaintiff prays that an appeal from the said judgment to the Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the allowance of the said appeal and for leave to prosecute the same and that a transcript of the record and the proceedings in this cause duly authenticated be forwarded to the said Circuit Court of Appeals.

Dated New York, N. Y., November 6, 1931.

John M. Lyons, Attorney for Plaintiff. Office & P. O. address: 27 William Street, Borough of Manhattan, New York City.

[fol. 28] IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

The above appeal is hereby allowed.

Dated New York, N. Y., November 6, 1931.

Frank J. Coleman, U. S. D. J.

Citation, in usual form, omitted in printing.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Dated New York, N. Y., January —, 1933.

John M. Lyons, Attorney for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 350

Argued April 6, 1933. Decided May 8, 1933

HAMBURG-AMERICAN LINE, Appellant,

v.

THE UNITED STATES OF AMERICA, Respondent

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York; dismissing a complaint at law for money had and received.

Roger O'Donnell, of Washington, D. C., for appellant.
Frank Chambers, of New York City, for appellee.

L. HAND, Circuit Judge:

The plaintiff sued under the Tucker Act (24 Stat. 505) to recover for money paid to discharge a fine levied by the Secretary of Labor as a penalty for bringing in an alien without visa under section 16 (a) of the Quota Act of 1924 (8 U. S. C. A. § 216 (a)). The complaint alleged that the plaintiff was a common carrier—the owner of a line of steamers—which had in 1928 brought to the port of New York one, O'Reilly, an alien, who applied for admission as a returning resident, and was excluded as an immigrant without visa. The Commissioner of Immigration thereupon fined it $1,000, together with $140 return passage money. O'Reilly was a native Irishman, who had acquired a residence in the United States, had left in June, 1928, and was coming back. He had failed to get a return permit as provided for in section 10 of the Quota Act (8 U. S. C. A. § 210), but he was eventually admitted, though for what reason does not appear. Thereafter the Secretary of Labor imposed a fine of $1,000, remitting the passage money. The plaintiff

paid under protest and the action was in part to recover the fine; there were other causes of action not here relevant. The defendant answered without material denials, and alleged as a defense that the plaintiff had been negligent in inquiring as to the status of the alien, whose inadmissibility was apparent. The court dismissed the complaint on the pleadings, and the plaintiff appealed.

The question presented is whether a carrier is liable to a fine under section 16 of the Quota Act of 1924 for bringing an alien to the United States who has been admitted in the past, has acquired a residence, has left on a temporary visit without procuring a permit, comes back without a visa, and is eventually admitted a second time. Section 16 (a) broadly provides that it shall be an offence to bring in any alien without a visa; no exception is made as to those who may be admissible under section 13 (a), of the Act (8 U. S. C. A. § 213 (b)). It is just possible that Congress intended to fine carriers who brought in aliens who had no visa, even though armed with a satisfactory permit. That, we must own, would be an extreme penalty, but section 16 (b), of the act (8 U. S. C. A. § 216 (b)), gives the Secretary a discretion, and it may have been intended to put a carrier to the hazard that the permit would be rejected, especially as it may not be conclusive of the fact, section 10 (f) of the act (8 U. S. C. A. § 210 (f)). The final decision must be made in this country, and perhaps the carrier's opportunity under section 16 (c) of the act (8 U. S. C. A. § 216 (c)) to secure remission of the fine on the ground that he had made all reasonable inquiry in advance, was thought enough. Elting v. North German Lloyd, 287 U. S. 324, 53 S. Ct. 164, 77 L. Ed. —. The contrary was ruled in Rederiaktie-bolaget, etc., v. U. S., 61 F. (2d) 808 (C. C. A. 9), where indeed the court appears to have gone further by way of dictum, and to have held that returning aliens were not within section 16 at all. It would follow that the section would not even cover a case where they were excluded. To that we cannot agree. However, for argument we will assume that the statute does not apply when they have satisfactory permits, reserving the point; but it does not seem to us consonant either with the letter, or the intendment of the law, to say that when they have neither a visa, nor a satisfactory permit, it is lawful to bring them here. If an exception is to be made to the language of sec-

tion 16, it must be at least so confined as to preserve its purpose.

The plaintiff argues that, however that may be, as O'Reilly was finally admitted, the fine could not accrue in any event. From this position two separate questions arise: First, whether the Secretary had power in his discretion to admit O'Reilly at all; second, whether if he did, he could fine the plaintiff. As to the first; section 10 provides for the issue of a permit, and subdivision (f), that the section as a whole shall not make the permit the only evidence that the alien is returning from a sojourn. However, section 10 does not profess to declare what is the effect of having a permit, or of having none; it is section 13 (b) which alone authorizes the admission of "immigrants" without visa. Subdivision (a), § 13 (8 U. S. C. A. § 213 (a)), requires a visa of all, and would be peremptory against those returning from a sojourn, were it not that subdivision (b) exempts from the class so excluded those who have lived here, and are coming back from a visit; but in that case only as may be provided by regulation. The whole situation then is this; all "immigrants" must produce visas except those of O'Reilly's class; they may be admitted only according to regulation, and they may get permits which section 10 does not make the only competent evidence. What other evidence shall be competent, and how far permits shall be evidence, therefore depend upon the regulations.

The pertinent regulations are Rule 3, subdivision F, paragraphs 1 and 3, and subdivision I, paragraph 2. Paragraph 1 of subdivision F excepts those who have permits from the class of whom visas are required; it implies that those who have neither visa nor permit shall not be admitted. This is confirmed by paragraph 3, which further extends the class of admissibles to those whose permits may have expired en route. Paragraph 2 of subdivision I makes the permit only prima facie evidence, and requires the alien generally to satisfy the officials. Thus the regulations as a whole require a permit of all aliens in O'Reilly's class, though, in the limited case of paragraph 3 of subdivision F, it may have expired. But there seems to be no doubt that returning aliens must have either visa or permit of some kind. All this is in "implementation" by regulation of the privilege given by section 13 (b).

Although subdivision (d) of section 13 (8 U. S. C. A. § 213 (d)) gives a limited discretion to the Secretary, this does not extend to subdivision (b), as to which he must proceed according to the regulations made under section 24 (8 U. S. C. A. § 222), by the Commissioner General with his approval. A strong argument might therefore be made that he has no more power to admit an alien in the face of the regulations than if the statute itself forbade. Regulations have the force of law; they require the assent of both officials; they are published; they are in general terms. The Secretary, it may be urged, no more than any one else, may lawfully dispense with them in the exercise of a personal discretion, such as in other cases the statute expressly allows him. If so, O'Reilly was not lawfully admitted, and the question would not arise as to what would be the result if he had been, as for example, under section 13 (d). Whatever the unfairness of enforcing the law against the carrier in spite of its violation in the alien's favor, we could not interfere.

But it is not necessary so to hold, for though he was lawfully admitted, nevertheless the fine was due. Subdivision (f) of section 13 (8 U. S. C. A. § 213 (f)) provides that nothing in the section at large shall effect a remission of any fine "accrued under section 16." The only remission which the section could effect would be in case of the Secretary's discretionary interposition to admit. If it be supposed that under subdivision (b) the Secretary has discretionary power to admit an alien of O'Reilly's class, who does not comply with the regulations, at least the exercise of that discretion cannot go further than if the Secretary had admitted him under subdivision (d). The fine incurred by virtue of section 16 would still stand; subdivision (f) so provides. Thus our decisions are inapplicable, which have intimated, if they did not decide, that in other situations the admission of the alien tolls the fine. Norddeutscher Lloyd v. U. S., 213 F. 10 (C. C. A. 2); Compagnie Generale, etc., v. U. S., 51 F. (2d) 1053 (C. C. A. 2); Lloyd Sabaudo Societa v. Elting, 55 F. (2d) 1048 (C. C. A. 2). That may well be true when the statute does not say otherwise, but not here.

Furthermore, subdivision (f) answers the argument, sometimes put forward, that the fine, which is made up of the return passage money and a penal sum, is indivisible.

Compagnie G., etc., v. U. S., supra; Lloyd Sabaudo Societa v. Elting, supra. Compare Norddeutscher Lloyd v. U. S., supra. Since the subdivision necessarily contemplates a case where the alien is admitted, and declares that the fine shall not then abate, we must choose whether to impose both items, or only the penal sum. As it is incredible that Congress should have intended to impose the return passage money when the alien stopped here, we choose the alternative. Thus, even though we are to assume that section 16 does not cover the importation of aliens who are admitted under a permit, the fine was proper. If the Secretary had no power to admit O'Reilly, his mistake could not relieve the plaintiff. If on the other hand he had a dispensatory power over the regulations, nevertheless it had no greater effect than his power to admit under section 13 (d). Section 13 (f) preserves the fine against any discretionary admission. That the Secretary properly used his discretion under section 16 (b) is apparent; it was easy for the plaintiff to learn whether O'Reilly had a permit. We cannot disguise our doubts as to the correctness of this path through the labyrinth which it has pleased Congress to set up. The maze of verbiage from which we are to extract a consistent intent, is beyond measure baffling; certainly must await an authoritative ruling, but, as best we can grope our way, we are content to follow the learned District Judge.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the City of New York, on the 15th day of May, one thousand nine hundred and thirty-three.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

HAMBURG-AMERICAN LINE, Plaintiff-Appellant,

vs.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Hamburg-American Line vs. United States. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 15, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 35, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Hamburg-American Line, plaintiff-appellant, against United States, defendant-appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of July, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (United States Circuit Court of Appeals, Second Circuit.)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,946. U. S. Circuit Court of Appeals, Second Circuit. Term No. 343. Hamburg-American Line, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed August 14, 1933. File No. 343, O. T., 1933.

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